Privy Council Appeal No. 101 *of* 1920.

Raymond Van Hemelryck - - - - - - *Appellant*

v.

The William Lyall Shipbuilding Company, Limited - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.

[*Delivered by* LORD BUCKMASTER.]

On the 20th March, 1919, the respondents obtained leave *ex parte* from the Chief Justice of the Supreme Court of British Columbia to issue and serve against the appellant out of the jurisdiction notice of a writ claiming damages for breach of a contract alleged to have been entered into by them with the appellant for the sale and delivery to him of six sailing vessels.

The appellant moved to rescind the order, but his application was dismissed by Mr. Justice Murphy, on appeal to the Court of Appeal of British Columbia this order was confirmed, and from that judgment by special leave this appeal has been brought. A question arose in the course of these proceedings as to whether an application by the appellant for leave to cross-examine amounted to a submission to the jurisdiction, but this point need not be considered as for other reasons their Lordships think that this appeal must fail.

The rule which permits service out of the jurisdiction in British Columbia is the same as that which exists in this country, and the relevant part of that rule provides that leave to effect such service may be granted when the action is founded on any breach

or alleged breach within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction.

The appellant objects in the present case that there is in fact no contract as between himself and the respondents, and, further, that if such contract exists there has been no breach within the jurisdiction of any of its terms.

With regard to the first matter the difficulty arises in this way. Cablegrams and correspondence passed between the parties during the months from July to October, 1918, as to terms for the purchase by the appellant of the six sailing vessels, and ultimately, when an agreement appeared to have been reached, a document was drawn up dated the 7th November, 1918, putting into full and formal language the arrangements to which the parties ultimately agreed. This document, the appellant states, was delivered as an escrow, and the appellant contends that as the conditions upon which delivery was to be made complete have never in fact been satisfied, he is not liable under its terms. That may be true, but in that event it might, none the less, be also true that he was liable under the previous correspondence and cablegrams which had led up to the making of that contract.

So far as the Courts in British Columbia are concerned the learned Judges in the Court of Appeal at least appear to have assumed that the question as to whether or no there was a contract was one which had not been strenuously argued before them. Counsel for the appellant, however, say that this statement must have been due to some misapprehension. Their Lordships only refer to the matter for the purpose of making clear that they do not intend by the opinion which they express to prejudice in any way the right of the appellant to urge at the hearing of these proceedings that in fact no contract existed between himself and the respondents at all. For the purpose, however, of enabling the discretion which is conferred by the rules to be exercised, it is sufficient if there appears reasonable evidence that a contract has been made, unless, indeed, the defendant is in a position to satisfy the Court that such evidence should be disregarded and that in fact there was no contract at all. Their Lordships think in the present case that there is sufficient evidence of a contract, to found the jurisdiction, although they do not intend to exclude the appellant from trying to show at the hearing that no contract in fact exists.

The remaining question is whether, assuming there be a contract, it ought to be performed within the jurisdiction according to its terms. On this point it is well settled that for the purpose of satisfying the rule it is sufficient if there be in fact one term that has to be performed within the jurisdiction ; but, as was recently pointed out in the case to which reference has been made in Mr. Justice McPhillips' judgment *Johnson* v. *Taylor Brothers, Limited* [1920] A.C. 144, that principle cannot be

invoked for the purpose of using an artificial cause of action in order to found jurisdiction when the real right of action would be somewhere else.

But even on this assumption there still remained the breach due to refusal to accept the ships, which, though it would follow in sequence the payment of the money, was a real and substantial breach of the contract sufficient to satisfy the rule.

The argument, however, that has been urged in support of the appeal is that here the real breach is non-payment of the money, and that non-payment of the money was a breach that must have taken place, at any rate according to the terms of the formal document, in New York, and that it was that precedent breach that really gave rise to these proceedings. If, however, this document be, as the appellant contends, inoperative, there remains the question as to the contract created by the correspondence, which contains no express condition making payment of the balance of the purchase money a condition precedent to the delivery of the vessels, nor is there any express term as to the place where the balance of the purchase money is to be paid. In the result the appellant has declined to be bound by the contract, and it results that he has refused to accept the vessels which were to be delivered at Vancouver. This refusal is a real and substantial cause of action and satisfies the conditions of the rule.

For these reasons their Lordships think this appeal must fail and should be dismissed with costs. They will humbly advise His Majesty accordingly. The time for entering appearance in the action will be extended to six weeks from to-day.

In the Privy Council.

RAYMOND VAN HEMELRYCK

v.

THE WILLIAM LYALL SHIPBUILDING COMPANY, LIMITED.

DELIVERED BY LORD BUCKMASTER.

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